THE POLICE POWER AND CIVIL LIBERTY.

The recent decision of the Supreme Court of the United States in the case of Lochner *v.* The People of the State of New York,[1] is of deep import to every American citizen, because it establishes another landmark in defining the boundary line between the spheres of governmental force and individual liberty.

The legislature of the State of New York enacted that no employé should be required or *permitted* to work in a biscuit, bread or cake bakery, or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day.[2]

This Act was upheld by the Supreme Court of the State of New York,[3] two of the five judges dissenting, and also by the Court of Appeals of that State,[4] three of the seven judges dissenting, but has been declared unconstitutional by the Supreme Court of the United States, as being in violation of the Fourteenth Amendment of the Constitution which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

That the term "liberty" includes the right to pursue any lawful calling, and the term "property" the right to contract has already been declared by the Supreme Court. In Allgeyer *v.* Louisiana,[5] the Court said:

"The liberty mentioned in that amendment (the Fourteenth) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his all faculties; to live and work where he will; to earn his livelihood by any

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[1] (1905) 198 U. S. 45.

[2] Laws of 1897, Chapter 415, Article 8, Section 110.

[3] People *v.* Lochner (1902) 73 App. Div. 120.

[4] People *v.* Lochner (1904) 177 N. Y. 145. [5] (1897) 165 U. S. 578.

lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The Fourteenth Amendment to the Constitution, however, was not intended to interfere with the police power of the States.[1]

The "police power" has never been exactly defined by courts or legislatures, but there are two attributes which may be predicated of it: it acts by restraint and compulsion on the individual, and it does so to promote the public welfare.

There is a sphere of interests embracing safety, health, and morals, in which the exercise of the police power is conceded, and the only question that arises is the extent to which the legislature may *reasonably* and *appropriately* go. As related to this group may be considered also the care, control and protection of dependent classes, those who are not strictly *sui juris*.

There is another sphere of economic interests, the production and distribution of wealth, in which the exercise of the police power is by no means so generally conceded. Legislation in this domain is in the experimental stage, and much that has been attempted is class legislation or unwarranted and oppressive interference with individual rights which cannot be justified as being of equal benefit.

It is not necessary to consider here the original conception of the police power, or its historical development, but the practice of the Supreme Court shows that it is the power in the narrow sense of prescribing regulations to promote the public safety, health, morals, and welfare that is conceded to the States.

When or how far the police power of the States may be legitimately exercised with regard to such subjects must be left for determination in each case as it arises.[2]

In Crowley *v.* Christensen,[3] the court said: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing

[1] Barbier *v.* Connolly (1885) 113 U. S. 27.

[2] Allgeyer *v.* Louisiana (1897) 165 U. S. 578.

[3] (1890) 137 U. S. 86.

authority of the country essential to the safety, health, peace, good order and morals of the community."

Whether the means employed are adapted to the end in view is a question for the courts. If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the Constitution.[1]

Opinions may differ as to whether the statute of the State of New York regulating the hours of labor in bakeries, which was under discussion in the Lochner case, should be regarded as a measure for the protection of the public health, or an economic measure, the first installment, perhaps, in a general scheme for the regulation of the hours of labor in all occupations.

This particular provision is one section of a law entitled "An Act in relation to labor, constituting Chapter 32 of the general laws," which is known as "The Labor Law." It is associated with other sections which are unquestionably sanitary in their nature. The essential character of this restriction is of course not to be determined by its name, nor by its accidental associations, over neither of which it had any control.

Legislation in the several States of the Union attempting to regulate the hours of labor may be grouped into four classes, as follows:

(1) Those which fix what shall be regarded as a full day's labor in the absence of any contract between the parties.

(2) Those which fix the hours of adult laborers and prohibit contracts for longer hours without special rates or pay for overtime.

(3) Those which fix the hours of labor of persons not fully *sui juris*, as minors, or in some States women of all ages.

(4) Those which fix the hours of labor under the police power in occupations especially dangerous or unsanitary, or in which the safety of the public is especially concerned.

[1] Mugler *v.* Kansas (1887) 123 U. S. 623.

The statute in question does not fall within either the first or second class. It establishes an absolute limitation, the violation of which is punishable and which cannot be waived by the employé. The language of the statute is, "No employé shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionery establishment more than sixty hours in any one week or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employé shall work."

To find some excuse then for abridging the individual's right to labor when and where he will which to those who have inhaled the air of America for several generations seems *fundamental*, we must consider either that bakers are not fully *sui juris*, or that the baking of bread, cake and pie is especially dangerous or unsanitary, or an occupation in which the safety of the public is especially concerned.

It has never been intimated before that bakers were not as intelligent and as able to resist oppression as those engaged in other trades. If they are to be classed with incompetents and dependents, we are face to face with an appalling situation. Would it not be better for the public welfare to provide suitable opportunities and facilities for the proper training of bakers, than by curtailing their hours of activity, to merely diminish the output of their deleterious concoctions?

It is as a health measure, an Act to protect the health of the public and of the bakers themselves, that this law was sustained by the State courts as a proper exercise of the police power. To quote from the opinions of the court:

"It is but reasonable to assume from the statute as a whole that the legislature had in mind that the health and cleanliness of the workers as well as the cleanliness of the work rooms was of the utmost importance, and that a man is more likely to be careful and cleanly when well and not overworked than when exhausted by fatigue which makes for careless and slovenly habits and tends to dirt and disease. . . .

"That the public generally are interested in having bakers' and confectioners' establishments cleanly and wholesome in this day of appreciation and apprehension on account of microbes which cause disease and death, is beyond question. . . . It is within the police power of the legislature to so regulate the conduct of that business as to best promote and protect the health of the people."

And again:

"Vital statistics show those vocations which require persons to remain for long periods of time in confined and heated atmosphere filled with some foreign substance, which is inhaled into the lungs, are injurious to health and tend to shorten life. Bakers and confectioners who, during working hours, constantly breathe air filled with the finest dust from flour and sugar have a tendency to consumption, the most terrible scourge known to modern civilization and resulting in more deaths than any other disease."

One might venture to suggest that if the legislature had intended this provision as a health measure, to make it effective, it should have enacted that individuals should not be permitted to bake more than ten hours a day, and then placed them under proper surveillance to see that the law was not evaded. In some countries the system of a government spy in each household has been adopted. As the law was framed, after having baked for ten hours for one employer in one bakery, the weary baker might carry his microbes to another bakery and there toil for ten hours more to the detriment of the public health.

If to safeguard the public health, those who make bread must work not more than ten hours a day, should there not be similar laws for those who make the various ingredients that enter into the composition of bread, namely the flour, butter, lard and sugar? If it is the health of the bakers themselves that is sought, have not the employés in many other dangerous occupations, such as white lead workers, glass blowers, metal polishers and grinders, laborers in chemical establishments and others, an equal claim on the solicitude of the legislature? There are experts doubtless who deem labor of all kinds, both mental and manual, unhealthy.

The more carefully section 110 is scrutinized the more difficult it is to determine the underlying motive. It provides that no employé shall be permitted to work in a bakery more than ten hours a day. This prohibition would seem to apply to cashiers, bookkeepers, salesmen, clerks, errand boys, or even painters or carpenters temporarily employed in the establishment, and yet these persons are not subjected to any extraordinary peril, unless it be the temptation to overindulge in the products of the bakery.

Health legislation is peculiarly liable to abuse, both in scope and mode of enforcement. There is no locality and no occupation in which some menace to health does not lurk—perhaps not an unmixed evil, when we consider that our planet is limited in area, and means of transit to other orbs have not yet been perfected.

Excuses for State intervention on this score are legion. Instances might be cited where entire families have been reduced to a state of nervous prostration by the belated efforts of the health authorities to render their abodes sanitary. This paternal zeal is particularly noticeable in cases where structural changes may be ordered, and it has been said that the delicate relations ofttimes existing between the authorities and sanitary engineers and others offer a fruitful field for research to the student of modern finance. The public may be annoyed by the selfishness of the individual, but it is also true that the individual may be destroyed by the selfishness of the public's representative officials.

There must certainly be some limit to legislation of this sort, and it is perhaps safer to err on the side of the liberty of the individual. What could be more injurious to the health of the more finely organized members of every society or community than vulgar inquisitiveness and inane gossip on the part of fellow members, yet the State would scarcely be justified in depriving these unfortunates of the only happiness, which in their present stage of development they are able to pursue.

Regulating in detail the thought and conduct of others "for their own good" has a peculiar fascination for those who know but one way of thinking and doing, but it requires, nevertheless, infinite knowledge and wisdom, not always found in the majorities in our legislatures.

The point at issue in the Lochner Case is not whether bakers as well as laborers in other occupations would not be benefited by shorter hours of labor, that they might have more leisure for rest, self-improvement and the upbuilding of their homes. Much has been and more may be accomplished along this line by intelligent co-operation among the individuals themselves.

The question is whether the legislature should substitute its judgment for that of the members of any particular trade, and invoke the physical force of the State to prevent them from working when they believe it for their best interest to do so.

To regulate the hours of labor without regulating wages would be of doubtful benefit to the wage earner, for in lessening the amount he may earn in a day, not only the health but the very lives of himself and family may be jeopardized. Wages however do not depend on legal enactments. Many abortive attempts to control natural laws by legislation have been made from the days when King Canute issued his royal edict against the advancing waves to the more recent but equally unsuccessful attempt to make fifty cents worth a dollar by legislative fiat.

As a matter of precedent, the cases in which the Supreme Court has recently upheld State statutes regulating hours of labor are distinguishable from the Lochner case and rest upon different principles.

The control of public functions belongs to the corporate powers of the government. It was accordingly held in Atkin *v.* Kansas[1] that it was within the power of a State as guardian or trustee of its people and having full control of its affairs to prescribe the conditions upon which it would permit public work to be done on behalf of itself or its municipalities, which are but agents of the State for the purpose of local government. The court therefore upheld as constitutional a statute providing that eight hours shall constitute a day's work for all laborers employed by or on behalf of the State or any of its municipalities, and making it unlawful for anyone thereafter contracting to do any public work or require or permit any laborer to work

[1] (1903) 191 U. S. 207.

longer than eight hours per day except under certain specified conditions.

The limitations on the powers of the State legislatures created by the Fourteenth Amendment for the defense of private liberty has no application to such cases.

A statute of Minnesota enacted that "all labor on Sunday is prohibited excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community: Provided however, That keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards, shall not be deemed a work of necessity or charity." The Supreme Court in the case of Petit *v.* Minnesota[1] held that the legislature did not exceed its legislative police power in declaring as a matter of law keeping barber shops open on Sunday is not a work of necessity or charity, while, as to all other kinds of labor, they have left that question to be determined as one of fact.

This case might perhaps have been based also on the authority of the legislature to regulate the observance and prevent the desecration of the Christian Sabbath, one of the recognized civil institutions of the State.

Finally, in Holden *v.* Hardy,[2] the court sustained as a valid exercise of the police power of the State, an Act of the Legislature of Utah which limited the employment of workmen in all underground mines to eight hours per day "except in cases of emergency where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day except in like cases of emergency. It was held that the kind of employment, mining, smelting, &c., and the character of the employés in such kinds of labor were such as to make it reasonable and proper for the State to interfere to prevent the employés from being constrained by the rules laid down by the proprietors in regard to labor.

The following citation from the opinion of the State Court was approved: "The law in question is confined to the protection of that class of people engaged in labor in

[1] (1900) 177 U. S. 164. [2] (1898) 169 U. S. 366.

underground mines and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments."

The law of Utah treats this class of laborers as in a sense wards of the State and entitled to special protection.

The case of Lochner *v.* The State of New York is a luminous one as showing that the Supreme Court of the United States—the bulwark of American liberty—views with disfavor the intrusion of governmental force and inquisitorial power into private life and business, except in cases where the public interest is plain and palpable.

While the State, aided by generous and patriotic citizens, through the maintenance of schools, colleges, universities, art-galleries, museums and other educational institutions, is affording unprecedented opportunities for intellectual, moral and spiritual growth, we may expect to see the sphere of the police power narrow, as we progress toward that ideal state of society wherein each member, not a law unto himself, has the law within himself.

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